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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 28

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| LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 872,<br><br>Respondent,<br><br>and<br><br>NAV-LVH, LLC D/B/A WESTGATE LAS VEGAS RESORT & CASINO,<br><br>Charging Party. | Nos. 28-CC-148007<br><br>**RESPONDENT'S REPLY BRIEF TO ANSWER BRIEF TO LOCAL 872'S CROSS EXCEPTIONS** |

## I. INTRODUCTION: WESTGATE DOES NOT RESPOND TO ULTIMATE CONCLUSION OF THE ALJ.

In 48 pages of often overstated and vituperative language, the Respondent has failed to effectively address any of the arguments in the Brief In Support of Cross-Exceptions filed by Local 872.

Westgate remarkably fails to address the point made by the Administrative Law Judge. Even assuming that there was a trespass on the utility cutouts, the inflatable critters didn't interfere with the business activities of the casino. Westgate takes the position that a trespass, no matter how minor, constitutes coercion Westgate fails to explain how putting these beautiful and attractive critters up on the cutouts forced a multi-million dollar corporation in its choice of contractors. The failure of Westgate to address this issue in any way should end this case. The

Board can summarily affirm the Administrative Law Judge. We hope the Board doesn't do so for the reasons addressed in our cross exceptions and as briefly noted below.

## II. WESTGATE ERRONEOUSLY CLAIMS THAT THE BOARD CANNOT ADDRESS THE FIRST AMENDMENT.

We wish that the Board could avoid addressing other federal statutes or the Constitution. Justice Rehnquist, in a notorious decision, made the opposite very clear. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). The NLRB couldn't ignore the immigration laws.

As detailed in our brief, moreover, the Board has repeatedly contended with the First Amendment implications of Section 8 (b)(4)(ii)(B), 29 U.S.C. §158(b)(4)(ii)(B). It is forced to do the same in this case.

Mercifully, Westgate wastes only 3 pages of its brief in responding to the merits of our argument that Section 8(b)(4)(ii)(B) is unconstitutional. Westgate Brief, p. 6-9. Westgate's argument boils down to the claim that this is a trespass case. However, the Board would only be going after the Union because of the limitations of Section 8(b)(4)(ii)(B) because of the language on the banners and the message in contained in the very attractive critters. It is thus plainly content-based restriction, and 8(b)(4)(ii)(B) violates the First Amendment.

## III. THE CRITTERS AND BANNERS ARE PROTECTED BY SECTION 8(C)

Westgate's arguments demonstrate that Section 8(c) 29 U.S.C. Section 158(c) of the Act still protects speech. Section 8(c) was an attempt by Congress to impose the First Amendment on the Act. See Robert Gorman and Matthew Finkin, *Labor Law Analysis and Advocacy*, (2013) at Paragraph 7.8.

Section 8(c) protects the "expressing of any view…or the dissemination thereof, whether in written …or visual form. The critters fall within the "visual form." The banners are similarly visual and written. They are protected. Cf, *NLRB v. Virginia Electric*, 314 U.S. 469 (1941). [1]

If the Board does not read Section 8(c), to extend to this form of speech, which is not coercive, then Section 8(c) is also unconstitutional. It is under-inclusive in that it does not protect

[1] One of the leading treatises on secondary boycotts doesn't address this case or Section 8(c).See Miscimarra et. al., *The NLRB and Secondary Boycotts* (3rd ed.2002). It does concede that the Frist Amendment application to secondary activity is "unclear." See page 358. We offer this case as a chance to reduce that lack of clarity.

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this form of speech using inflatable critters and banners. See *Fred Meyer Stores*, 362 NLRB No. 82 at p. 3-4 (2015). See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1960) (coercive speech not protected). Section 8(c) protects union speech. See Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883 (1982), and Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 10 (1984). The problem for Westgate is that the critters and the banner are not picketing and are protected as speech by Section 8(c). Here, the Board is again faced with a square conflict with the constitutionality of Section 8(c) unless it is construed to protect this speech.

## IV. THE LOCAL UNION IS A PERSON WITHIN THE MEANING OF THE RELIGIOUS FREEDOM RESTORATION ACT; ITS MEMBERS ARE PERSONS.

The Local Union members are persons, and the message directly addresses issues about immigrant workers abuse, which is a central concern to any religion. People immigrated to this country often because of religious persecution. Protecting immigrants has thus been a central activity of many religions in this country. The RFRA applies to this activity. The RFRA would have protected the Pilgrims and many other religious immigrants. It protects the modern day protector of immigrant rights. If it doesn't apply to Local 872 as a person, it applies to its members.

## V. THERE WAS NO PICKETING, AND BANNERS AND CRITTERS ARE PROTECTED BY THE ACT AND THE FIRST AMENDMENT.

We argued in our brief, at page 20, that there was no picketing. Westgate has ignored that argument. We argued in our brief that bannering is lawful and a protected activity. See Brief p. 22-25. Westgate has not responded.

The only thing that Westgate has focused upon is the question of whether there was trespass. In fact, Westgate wastes 32 pages on the trespass issue.

## VI. TRESPASS CLAIMS ARE PREEMPTED WHERE THERE IS NO VIOLENCE OR OTHER ASSOCIATED CONDUCT.

Claims of mere trespass are preempted. See Brief p. 26-29. *Radcliffe v. Rainbow Construction Co.*, 254 F.3d 772 (9th Cir. 2001), did not address the question of preemption of

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trespass. Counsel's brief quotes a small portion of the brief (at Westgate Brief p. 42) suggesting that *Radcliffe* governs trespass claims. It does not do so. *Retail Property Associates* is the most recent word on this issue, and here the claim is clearly preempted.

## VII. WESTGATE HAS NO PROPERTY INTEREST.

Westgate concedes that the cross-exceptions are correct that it had no property interest. It now seeks to explain the lack of consistency and record evidence as to who owned the property at the time of the First Amendment activity by claiming there was a subsequent name change. It offers documents that were never produced in the record. The Board should reject those documents and conclude that the Charging Party was not the owner of the property but rather was a different entity.

In summary, even if Westgate had some ownership interests, that ownership interest was attenuated and reduced by the public nature of the cutouts and the failure of the Charging Party or anyone to take any action to remove the wonderful critters until the Board Charge was filed. Obviously, Westgate didn't think that the trespass was of any severe consequence until some 6 or 7 days after the critters had been peacefully resting and attracting attention to themselves on the utility cutouts. There was, therefore, no cognizable trespass, and any trespass claim would be preempted.

## VIII. CONCLUSION

The Board must find Section 8(b)(4)(ii)(B) unconstitutional under the circumstances of this case. The Union's activity is protected by Section 8(c). It cannot be applied to prohibit the Union's conduct; even if it was, to some degree, a form of trespass. This case will serve as important precedent that unions can engage in some activity on the property of other persons who are neutral without violating Section 8(b)(4)(ii)(B). This case invites the critters to move further into the property perhaps into the casino itself.

The Decision of the Administrative Law Judge should be affirmed except to the extent argued in our cross-exceptions. This case should be remanded to the ALJ to determine the amount of fees to which the Respondent is entitled under the Religious Freedom Restoration Act as well as remanded for an appropriate remedy to allow the Union to place these critters on the

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cutouts for a substantial length of time to remedy the unfair and illegal conduct of Westgate in having have them excluded.

We acknowledge the complement paid by Westgate to the effectiveness of our critters. Almost 100 pages of briefing to keep the critters off the cut outs suggest they were effective messaging to the public. They will be back.

Dated: December 22, 2015

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*/S/ DAVID A. ROSENFELD*
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**CERTIFICATE OF SERVICE**
**(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 22, 2015, I served the following documents in the manner described below:

**RESPONDENT'S REPLY BRIEF TO ANSWER BRIEF TO LOCAL 872'S CROSS EXCEPTIONS**

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 22, 2015, 2015, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

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